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Marion Superior Court

DOUBLE JEOPARDY IN INDIANA

Constitutional Provisions

- The Fifth Amendment to the United States Constitution provides “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”
- Article I, Section 14 of the Indiana Constitution states: “No person shall be put in jeopardy twice for the same offense.”

Double Jeopardy Prohibitions

- Re-prosecution for an offense after conviction.
- Re-prosecution after an acquittal.
- Multiple punishments for the same offense in a single trial.
- Re-prosecution after a conviction has been reversed for insufficient evidence.
- Criminal re-prosecution in limited circumstances following a previous civil prosecution.
- Re-prosecution in limited circumstances following a mistrial.

Federal and Indiana tests for determining when two crimes are the “same offense”

- Federal Double Jeopardy Test: Are the elements of the two crimes the same?
- Indiana Double Jeopardy Test: Is the actual evidence used to establish the essential elements of one challenged offense also used to establish all of the essential elements of another challenged offense?

Richardson v. State, 717 N.E.2d 32, 54 (Ind. 1999)

- Double jeopardy principles are violated when a reasonable possibility exists that the evidentiary facts used by the factfinder to establish essential elements of one offense were also used to establish the essential elements of a second challenged offense.

Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)

- “. . . [U]nder the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, BUT NOT ALL, of the essential elements of a second offense.” (Emphasis supplied.)

Spivey's treatment of Richardson

- Double jeopardy principles are violated when a reasonable possibility exists that the evidentiary facts used by the fact-finder to establish essential elements of one offense were also used to establish ALL OF the essential elements of a second challenged offense.

Pierce v. State, 761 N.E.2d 826 (Ind. 2002)

- Unanimous opinion in which common law double jeopardy like prohibitions are upheld.
- Defendant convicted of A felony burglary and B felony robbery. Both convictions could not stand where predicated on the same bodily injury.
- Robbery conviction reduced to a C felony.

Guyton v. State, 771 N.E.2d 1141 (Ind. 2002)

- “...an occasion to recapitulate our recent decisions on Double Jeopardy”
Id. at 1142.
- Adopts the Sullivan concurrence in *Richardson* as the basis for analysis of state constitutional double jeopardy claims.

The Guyton Five

- Conviction and punishment for both a greater and lesser included offense.
- Conviction and punishment for two crimes consisting of the very same act.
- Conviction and punishment for one crime and an element of another crime which consists of the very same act.
- Conviction and punishment for a crime and an enhancement of a crime where the enhancement is imposed for the very same behavior or harm.
- Conviction and punishment for a crime and conspiracy where the charged overt act is the very same act as another crime.

Conviction and punishment for both a greater and lesser included offense

Inherently included offenses

- Murder = voluntary manslaughter
- Murder = reckless homicide
- Murder = attempt murder
- Att. Murder = Att. Vol. Man
- Att. Murder = Att. Agg. Battery
- Rape = battery
- Carjacking/Robbery = theft
- Dealing = possession of same drug
- Murder = involuntary manslaughter, BUT

Crimes that are not inherently included offenses (factual analysis will have to occur)

- Involuntary Manslaughter \nsubseteq Murder
- Assisting a Criminal \nsubseteq Murder
- Battery \nsubseteq Murder or Attempt Murder
- Theft \nsubseteq Burglary
- Criminal Trespass \nsubseteq Burglary or Residential Entry

Conviction and punishment for two crimes consisting of the very same act

- *Dixon v. State*, 777 N.E.2d 110 (Ind. Ct. App. 2002). Double jeopardy violation: voluntary, involuntary manslaughter same shooting and victim. Involuntary manslaughter conviction vacated.
- *Alexander v. State*, 772 N.E.2d 476 (Ind. Ct. App. 2002), on rehearing. Double jeopardy violation: possession of firearm by serious violent felon, carrying handgun without a license. Evidence of constructive possession in handgun car used to support both convictions. Carrying a handgun conviction vacated.

Conviction and punishment for one crime and an element of another crime which consists of the very same act

- *Payne v. State*, 777 N.E.2d 63 (Ind. Ct. App. 2002). No double jeopardy: burglary, theft. Remand for imposition of sentence on theft charge
- *Oeth v. State*, 775 N.E.2d 696 (Ind. Ct. App. 2002). No double jeopardy: attempt rape, criminal deviate conduct. Evidence beyond the criminal deviate conduct existed to support substantial step element of attempt rape.
- **Look for this argument in felony-murder, attempt, and burglary cases**

Conviction and punishment for a crime
and an enhancement of a crime where
the enhancement is imposed for the very
same behavior or harm

- *Pierce v. State*, 761 N.E.2d 826 (Ind. 2002). Double jeopardy violation for A felony burglary and B felony robbery where same injury enhanced both crimes.

Conviction and punishment for a crime and an enhancement of a crime where the enhancement is imposed for the very same behavior or harm (continued).

- *Davis v. State*, 770 N.E.2d 319 (Ind. 2002).
Convictions challenged for attempt murder, aggravated battery, A felony burglary. Double jeopardy violation: attempt murder and aggravated battery, burglary reduced to B felony. Same act supported attempt murder and aggravated battery and same injury elevated burglary to A felony.
- *Oeth v. State*, 775 N.E.2d 696 (Ind.Ct. App. 2002).
No double jeopardy for attempt rape and criminal deviate conduct convictions as A felonies due to use of same deadly weapon in two crimes.

Trial Judges are doing well with this one.

- *Carrico v. State*, 775 N.E.2d 312 (Ind. 2002). Defendant convicted of murder and robbery. Robbery was properly reduced by trial court to a B felony from an A felony to avoid "same harm" double jeopardy violation where same death supported serious bodily injury enhancement.
- *Robinson v. State*, 775 N.E.2d 316 (Ind. 2002). Robbery was reduced by trial court to a B felony from an A felony to avoid "same harm" double jeopardy violation where same death supported serious bodily injury enhancement.

Conviction and punishment for a crime and conspiracy where the charged overt act is the very same act as another crime

- *Lamagna v. State*, 776 N.E.2d 955 (Ind.App. 2002). Double jeopardy violated: dealing cocaine, conspiracy to possess cocaine. Evidence to support dealing same as overt act of conspiracy.
- *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002). No double jeopardy violation for felony murder, conspiracy to commit burglary. Trial court merged burglary conviction and death of victim not charged as overt act of conspiracy. Proof of burglary was included for both crimes but did not establish all elements of either.
- Note: this exception is NOT limited to cases where a crime charged as overt act is the object crime of the conspiracy.

Remedies

- If double jeopardy principles implicate all elements of two crimes, one conviction must be vacated or judgment not entered. (*Blockburger, Richardson, Guyton* 1, 2, 3 and 5)
- If double jeopardy principles implicate an element that can be removed leaving a conviction intact, a court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation. (*Pierce, Guyton* 4.)

Double Jeopardy on Direct Appeal and PCR

- Double jeopardy claim is waived following guilty plea.
- *Richardson* will not be applied retroactively to post-conviction claims, claim is waived if it was not raised on direct appeal. BUT ...
- Common law exceptions that existed pre-*Richardson* are available for a post-conviction claim...AND

Double Jeopardy on Direct Appeal and PCR

- There is no common law double jeopardy claim outlawing a plea to “facially duplicative” charges. Convictions for plea to dealing and possession stand.
- A state double jeopardy violation is not automatically fundamental error on PCR.
- Counsel is not ineffective for failing to raise a state double jeopardy claim between 1997 and *Richardson*.

Arguments for Double Jeopardy Violation for Same Offense

- Same elements test: if the statutory elements of one challenged offense also establish the essential elements of another challenged offense.
- Actual evidence test.
- Guyton circumstances.
- Pierce common law principles.

Brain Teaser

- Defendant convicted of :
- Count 2: F/murder Hoffman while robbing Graham
- Count 3: Robbing Graham
- Count 4: F/murder Hoffman while robbing Hoffman
- Count 5: Attempt Robbery of Hoffman
- Count 6: Conspiracy to rob Graham/ overt act=entry into store while armed
- Count 7: Confinement of Graham/force=walking Graham to cash register
- Count 8: Confinement of Wallace/force=telling Wallace not to turn around

Answer

- Count 2: F/murder Hoffman while robbing Graham-stands
- Count 3: Robbing Graham-vacated
- Count 4: F/murder Hoffman while robbing Hoffman-merged at trial
- Count 5: Att. Robbery of Hoffman-stands
- Count 6: Conspiracy to rob Graham-stands
- Count 7: Confinement of Graham-vacated
- Count 8: Confinement of Wallace-stands